

## INDEX

---

	Page
Opinions below .....	1
Jurisdiction .....	2
Question presented .....	2
Statutes involved .....	2
Statement .....	2
Specification of errors to be urged .....	3
Reasons for granting the writ .....	3
Conclusion .....	5
Appendix .....	6

### CITATIONS

#### Cases:

<i>Johnston v. Commissioner</i> , 86 F. (2d) 732, certiorari denied, 301 U. S. 683 .....	4
<i>Klingenstein v. United States</i> , 18 F. Supp. 1015, certiorari denied, 302 U. S. 716 .....	4
<i>Neuberger v. Commissioner</i> , 104 F. (2d) 649, certiorari granted, May 27, 1940 .....	4
<i>Winmill v. Commissioner</i> , 93 F. (2d) 494, reversed, 305 U. S. 79 .....	4

#### Statutes:

Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Sec. 23 .....	6
Sec. 181 .....	6
Sec. 182 .....	6
Sec. 183 .....	6
Sec. 184 .....	6
Sec. 185 .....	7
Sec. 186 .....	7
Revenue Act of 1938, c. 289, 52 Stat. 447:	
Sec. 182 .....	7

(I)



# In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

v.

ZELDA BAKER JENNINGS ET AL.<sup>1</sup>

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled cause on April 11, 1940.

### OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 48-50) is unreported. The opinion of

<sup>1</sup> The taxpayers involved herein and the deficiencies assessed against them are as follows:

Clyde Jennings and his wife, Zelda Baker Jennings	\$352.54 each
J. O. Sheffield and his wife, Lillian Sheffield	93.95 each
L. K. Mason	3,013.62

the Circuit Court of Appeals (R. 61-64) is reported in 110 F. (2d) 945.

#### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 11, 1940. (R. 64.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

Whether the taxpayers may offset personal losses from gambling operations against their distributive shares of partnership gains from similar operations.

#### STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 6-7.

#### STATEMENT

The facts, as found by the Board of Tax Appeals (R. 49-50), may be summarized as follows:

In 1936, taxpayers were members of partnerships, each of which derived a portion of its income from gambling operations. The taxpayers also engaged in gambling operations in their individual capacities, which resulted in net losses. The distributive share of each taxpayer of partnership gains from gambling transactions exceeded the amounts of losses sustained by the taxpayers in their individual gambling operations. (R. 49.)

The Commissioner refused to allow individual gambling losses to be offset against distributive partnership income attributable to gambling. (R. 50.) The Board of Tax Appeals sustained the action of the Commissioner, but the Circuit Court of Appeals reversed, one judge dissenting.

**SPECIFICATION OF ERRORS TO BE URGED**

The Circuit Court of Appeals erred:

1. In holding that, under Section 23 (g) of the Revenue Act of 1936, the taxpayers may offset individual losses from gambling operations against their distributive shares of partnership gains from such operations.
2. In holding that a partner's distributive share of partnership profits from gambling operations retains its character as such in the calculation of the partner's individual tax liability.
3. In reversing the decision of the Board of Tax Appeals.

**REASONS FOR GRANTING THE WRIT**

The Circuit Court of Appeals, one judge dissenting, held that, under Section 23 (g) of the Revenue Act of 1936, *infra*, which permits the deduction of losses from wagering transactions only to the extent of the gains from such transactions, the taxpayers could deduct individual gambling losses from their distributive shares of partnership profits derived from gambling operations. In reaching that result, the court held that partner-

ship income, when distributed to the individual partners, retains the special characteristics which it had as partnership income. The decision below is thus in conflict, in principle, with *Neuberger v. Commissioner*, 104 F. (2d) 649 (C. C. A. 2d), where it was held that individual non-capital losses could not be deducted from the taxpayer's distributive share of partnership non-capital gains under the analogous provisions of Section 23 (r) of the Revenue Act of 1932. Although this Court had originally denied taxpayer's petition for certiorari in the *Neuberger* case (308 U. S. 623), certiorari was subsequently granted on May 27, 1940, after the decision below was rendered, upon taxpayer's petition for rehearing alleging conflict with the instant case.

The decision below is similarly in conflict, in principle, with the following decisions: *Johnston v. Commissioner*, 86 F. (2d) 732 (C. C. A. 2d), certiorari denied, 301 U. S. 683; *Klingenstein v. United States*, 18 F. Supp. 1015 (C. Cls.), certiorari denied, 302 U. S. 716; *Winmill v. Commissioner*, 93 F. (2d) 494 (C. C. A. 2d), reversed on other grounds, 305 U. S. 79.

While Section 182 (a) of the Revenue Act of 1938 specifically allows, for 1938 and subsequent years, the type of deduction involved in the *Neuberger* case, the instant question remains one of continuing importance, for there is no provision corresponding to Section 182 (a) relating to wagering transactions.

## CONCLUSION

Wherefore it is respectfully submitted that this petition should be granted.

FRANCIS BIDDLE,  
*Solicitor General.*

JULY, 1940.

## APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

### SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

\* \* \* \* \*

(g) *Wagering Losses*.—Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.

\* \* \* \* \*

### SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

### SEC. 182. TAX OF PARTNERS.

There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year.

### SEC. 183. COMPUTATION OF PARTNERSHIP INCOME.

The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual.

### SEC. 184. CREDITS AGAINST NET INCOME.

The partner shall, for the purpose of the normal tax, be allowed as a credit against his net income, in addition to the credits allowed to him under section 25, his proportionate share of such amounts (not in excess of the net income of the partnership) of interest specified in section 25 (a) as are received by the partnership.

SEC. 185. EARNED INCOME.

In the case of the members of a partnership the proper part of each share of the net income which consists of earned income shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary and shall be separately shown in the return of the partnership.

SEC. 186. TAXES OF FOREIGN COUNTRIES AND POSSESSIONS OF UNITED STATES.

The amount of income, war-profits, and excess-profits taxes imposed by foreign countries or possessions of the United States shall be allowed as a credit against the tax of the member of a partnership to the extent provided in Section 131.

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

(a) As a part of his short-term capital gains or losses, his distributive share of the net short-term capital gain or loss of the partnership.

\* \* \* \* \*